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No. 94-1760

In The

Supreme Court of the United States

October Term, 1994

60 KEY CENTRE, INC.,

Petitioner,

vs.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDINGS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of Petitioner, 60 Key Centre, Inc., ("60 Key") pursuant to Rule 15.6 of the Rules of the Supreme Court in reply to the opposing briefs submitted by Respondents, Administrator of General Services Administration ("GSA") and Acquest Holdings, Inc. ("Acquest").

There are three arguments raised in Respondents' opposing briefs which merit reply: (1) that the issue of the lease award is moot; (2) that Petitioner unnecessarily delayed in moving for injunctive relief; and (3) that the solicitation for offers contemplates "rounds of bidding".

REPLY ARGUMENT

I.

MOOTNESS

The Respondents both assert that regardless of the propriety of the government's actions, Petitioner could not be entitled to award (GSA.13, Acquest.2-3) since Petitioner had leased part of the space offered and thus would be unable to perform on the terms set forth in its best and final offer. This argument is without factual basis and was erroneously relied upon by the lower courts. There is no admissible evidence in the record supporting Respondents' contention that Petitioner would be unable to perform. Petitioner maintains, as it has repeatedly stated, that it stands ready to perform if awarded the lease.

Further, Respondent Acquest states that the bid of Petitioner was the worst of the three bids submitted and it would not have received the award in any event. This argument is likewise erroneous. 60 Key challenged the scoring system in the courts

below and more importantly, at the time of the lease award, Acquest and 60 Key were the only remaining offerors. Thus, had Acquest been excluded from the bidding, as it should have been, 60 Key would have been the recipient of the award in any case.

II.

PERCEIVED DELAY IN PETITIONER'S MOVING FOR INJUNCTIVE RELIEF

The Respondents also both assert that Petitioner was dilatory in moving for injunctive relief (Acquest.5, GSA.13) which permitted the U.S. Attorney's Office to occupy Acquest's offered space during the pendency of this action and thus the equities militate against the relief sought by 60 Key. 60 Key is not responsible for any delay in these proceedings. The District Court set the briefing schedule, with full knowledge of the facts and circumstances in this matter, to which 60 Key merely adhered. 60 Key had sought injunctive relief from the General Accounting Office well before this action was commenced, but the GSA nonetheless allowed Acquest's continued performance. 60 Key also had to repeatedly seek court intervention to secure Respondents' compliance with its discovery requests which significantly lengthened these proceedings.

It is inequitable to penalize or accuse Petitioner of laches for simply following the court-imposed schedule.

III.

THE SUBMISSION DUE DATE AND PROCUREMENT PROCESS

Contrary to the argument advanced by the GSA, the solicitation for offers (SFO) did not state that "initial" bids were due by February 26, 1992 nor that a new round of best and final

offers would be later established (*see generally*, GSA.2-3). The concept of "initial bids" and "new rounds" of offers does not exist in the terminology of the SFO nor is it envisaged by the Competition in Contracting Act, the General Services Administration Regulations or the Federal Acquisition Regulations.

Section 1.5 of the SFO states: "Offers are due by February 26, 1992 and must remain open until August 3, 1992." These requirements of the SFO clearly indicate that negotiation and award will take place within that time frame. Because offers were required to remain open until August 3, 1992, obviously the best and final offer due date would have had to be some time prior to August 3, 1992. Acquest did not even submit its offer until August 10, 1992. Therefore, Acquest did not respond within the time period contemplated for the entire negotiation and award process in this solicitation.

According to GSA, (GSA.12) early bidders such as Petitioner benefit from a longer period in which to negotiate changes in their proposals than do late bidders such as Acquest. However, on the facts of this case, Acquest clearly enjoyed an extended risk-free negotiation period and any claimed benefit to 60 Key was thereby nullified, not to mention costly in view of the length of time its offer was held open.

GSA argues (GSA.8-9) that the flexible deadline serves the underlying purposes of CICA to increase competition and safeguard against unnecessary sole-source contracts, by assuring that no bidder is prematurely frozen out of the procurement process.

This argument, taken to its logical extreme, will effectively assure that there is less competition since many rational parties will choose not to do business with the government on these

terms. According to GSA's own argument, there never needs to be any firm dates or finality with respect to considering offers since expanding the field will always benefit the government by increasing the number of offers.

The result of such unrestrained government conduct in direct contravention of the applicable statutes, is both unlawful and inherently unfair and has the opposite effects of those intended by Congress.

CONCLUSION

For the foregoing reasons and those set forth in 60 Key Centre, Inc.'s Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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